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Congressional Requesters

Subject: *Pigford Settlement: The Role of the Court-Appointed Monitor*

In 1997, three African-American farmers filed a class action civil rights lawsuit against the United States Department of Agriculture (USDA). These farmers alleged that USDA had willfully discriminated against them and other African-American farmers by denying their applications for farm loans and benefit programs, or by delaying the processing of their applications, and had failed to properly investigate and resolve their complaints of discrimination. This lawsuit, *Pigford v. Glickman*, was certified by the United States District Court for the District of Columbia as a class action suit on October 9, 1998.[1] On April 14, 1999, District Court Judge Paul L. Friedman approved and entered a consent decree settling this lawsuit. In doing so, the court noted USDA's long-standing discriminatory practices. The court stated that for decades USDA discriminated against African-American farmers by denying, delaying, or otherwise frustrating African-American farmers' applications for farm loans and other credit and benefit programs. The court also noted that USDA disbanded its Office of Civil Rights in 1983, and stopped responding to claims of discrimination. Finally, the court observed that the consent decree would not undo all that had been done to African-American farmers, but nevertheless concluded that it would be a fair, adequate, and reasonable settlement of the claims brought in this case.

Attorneys for the African-American farmers expected the value of the settlement to be substantial—estimating it to be worth at least $2.25 billion. However, the court stated that it was impossible to know exactly how much the settlement would cost the government, in part, because the size of the class of African-American farmers had not been determined. The court noted that 15,000 to 20,000 African-American farmers were estimated to be members of the class.[2] To notify potential class members, a court-appointed facilitator conducted an advertising campaign between January and March

[1]This case was filed in 1997 when the Honorable Daniel Glickman was Secretary of Agriculture. The case is also now referred to as *Pigford v. Johanns*, because the Honorable Mike Johanns has become the Secretary of Agriculture. The three farmers who filed the suit were representing a presumed class of 641 African-American farmers.

[2]As used in this report, the phrase "African-American farmers" refers to the class as defined by the court and not a more general definition. The certified class was defined as all African-American farmers who (1) farmed or attempted to farm between January 1, 1981, and December 31, 1996; (2) applied to USDA during that period for loans or benefits and believe they were discriminated against in USDA's response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA's treatment of their applications.

1999 to notify potential class members about the preliminary approval of the consent decree, and that a hearing on the fairness of the settlement was to be conducted in March 1999.[3] Following that hearing and the court's approval of the settlement, African-American farmers then had about six months to file claims and to be eligible for relief under the decree, with a filing deadline of October 12, 1999.[4] To assist farmers in preparing claims packages, attorneys representing African-American farmers held over 200 meetings in 21 states.[5] Since the filing deadline, officials appointed by the court have been responsible for considering the claims made by African-American farmers.

As of February 2006, over 97,000 people had filed claims under the consent decree or requests to file late claims---about five to six times more claims than anticipated. Of the 97,000, the court had received 23,314 claims seeking compensation by the filing deadline of October 12, 1999. About 900 of the on-time claims were determined to be not eligible. The court received an additional 73,816 requests for permission to file a claim after the October 12, 1999 filing deadline. Except in relatively few extraordinary cases, the claims received after the filing deadline were denied as not timely. Because so many farmers' attempts to file a claim were denied due to late filing, some claimants argued in court that the notice of the settlement was insufficient to reach the majority of potential class members.[6] Nevertheless, after review, the court ruled that the notice was more than adequate. Overall, by January 2006, about 22,400 claims had been reviewed, decided, and in some cases reexamined: about 14,300 claims—64 percent—were approved for payments and benefits totaling over $900 million. The remaining 8,100 claims—36 percent—have been denied. More than half of the claims that were initially denied have been or will be reviewed by the court-appointed monitor.

The court appointed four officials as directed under the consent decree:

- A facilitator to conduct an advertising campaign between January and March 1999 to notify known and potential members of the class that a settlement had been reached, to receive and screen potential class members' claims to determine whether they met the class definition, and to assign the claims to the adjudicator and arbitrator for action.

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[3]The parties to the case had agreed to an advertising campaign which included 62 commercials, advertisements in 142 newspapers, as well as advertisements in TV Guide and Jet Magazine. The campaign was carried out by the Poorman-Douglas Corporation, which had experience with class action litigation.

[4]For those individuals who could not file a claim by October 12, 1999 due to extraordinary circumstances beyond their control, the consent decree established a process by which they could petition the court to participate in the claims resolution procedures. Initially, the court set a deadline of January 30, 2000 for such petitions to be postmarked, but later extended this deadline to September 15, 2000.

[5]In addition, one meeting occurred in Washington, D.C. and one in the U.S. Virgin Islands. These meetings occurred over the nine months leading up to the filing deadline.

[6]This issue was also addressed in a November 2004 congressional hearing. *'Notice' Provision in the Pigford v. Glickman Consent Decree*, Hearing before the House Committee on Judiciary, Subcommittee on Constitution, November 18, 2004.

- An adjudicator to decide whether certain farmers' claims are supported by substantial evidence based on a review of their supporting documentation.[7] The adjudicator has reviewed almost all of the claims.

- An arbitrator to determine, after holding evidentiary hearings, whether certain farmers' claims are supported by a "preponderance of evidence." There have been 166 claims under this criterion. The arbitrator was also assigned responsibility for reviewing petitions to file late claims from potential class members.

- A monitor to review claimants requests to have a claim decision reexamined and to direct the other officials to reexamine a claim when an error occurred that resulted or is likely to result in a fundamental miscarriage of justice. The monitor began her duties in March 2000, about six months after the October 12, 1999 deadline for potential class members' to submit claims. The monitor is also responsible for attempting to resolve problems that class members have with the consent decree, and for periodically reporting to the court and the Secretary of Agriculture on the good faith implementation of the decree, but was not assigned specific outreach responsibilities under the consent decree. As of early 2006, the monitor's office had a staff of 26, including 12 attorneys, to assist in performing her assigned tasks.

A detailed description of our scope and methodology is provided in enclosure I. Based on the specific interests of our requesters, for this report we (1) determined the extent of the monitor's participation in outreach and outreach oversight for the *Pigford* case, and (2) identified the number of claims that the monitor in the *Pigford* case directed to be reexamined and the associated results. In addressing these objectives, we reviewed reports, testimonies, and summary data prepared by court-appointed officials associated with the *Pigford* case, including the court-appointed monitor. We interviewed the monitor, and obtained statistical information about the status of claims made under the consent decree. We did not review specific cases nor assess case decisions made under the consent decree. In addition to those efforts, based upon congressional interest, we developed information about the possible use of an ombudsman at USDA to address civil rights issues (see encl. II); and we searched legal databases and identified cases where the work of other court-appointed monitors was found by courts or Congress to be ineffective or problematic and what court or legislative remedies were provided (see encl. III). We conducted our work between August 2005 and March 2006 in accordance with generally accepted government auditing standards. A more detailed description of our methodology is provided in enclosure I.

[7]Claimants could request that their claims be considered on one of two tracks. Claimants selecting Track A have to provide substantial evidence for the adjudicator to approve a claim. Most successful Track A claimants are eligible for $50,000 payments and other relief. Claimants selecting Track B have to demonstrate the merits of their case in an evidentiary hearing conducted by the arbitrator—and can receive amounts equal to their actual damages, a discharge of certain existing debt and other relief.

Results in Brief

The monitor or attorneys from her office participated in 60 public meetings from February 2000 through December 2005 to reach out to class members, at the request of interested organizations. These meetings occurred in states where the majority of African-American farmers live, including Alabama, Arkansas, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. The monitor estimated that 9,400 individuals, including claimants, potential claimants, and government officials attended these meetings. However, the number and extent of participation at these meeting was uneven among the states—for example, a total of about 2,090 individuals attended 12 such meetings in Alabama, but only about 60 individuals attended the one outreach meeting in Texas. At these meetings, the monitor explained the role of her office and the process through which class members could petition to have their cases reexamined. In addition, through the monitor's toll-free number, the monitor's office has received over 131,000 phone calls about the *Pigford* case. These calls have involved questions about status of payments, debt relief, tax concerns, and other issues. The monitor also established a Web site (http://pigfordmonitor.org) that makes information about the case readily available to the public. Furthermore, in the monitor's reports to the Secretary of USDA, the court, class counsel and defendant's counsel she noted that many claimants expressed concern to her office that the advertising campaign did not reach many individuals who met the class definition but had not submitted a timely claim.

As of February 6, 2006, the monitor had ordered the reexamination of 2,059 initial claims decisions, and most reexaminations reversed or changed the initial decision. More specifically, African-American farmers had petitioned the monitor to direct the reexamination of 4,939 claims, and the government had requested that 730 claims decisions be reexamined. Of the 4,939 petitions from African-American farmers, as of February 6, 2006, the monitor had completed reviewing 3,631 of them and directed the arbitrator or adjudicator to reexamine 1,979 claims decisions; in 1,232 of these cases a previously denied claim was approved or the benefits awarded to the farmer were increased. The monitor observed that in most cases where she directed a reexamination, the farmer had provided her office with additional information supporting the farmer's claim of discrimination that had not been presented when the claim was initially denied. In addition, the government has petitioned the monitor to review claim decisions when it thought there were mistakes or flaws in the information provided by the claimants. As of February 6, 2006, the monitor had reviewed 605 of the 730 petitions submitted by the government for the reexamination of claims decisions and directed that 80 of them be reexamined. Of these 80, sixty-seven have been reexamined by the adjudicator or arbitrator, and in 59 of these cases a previously approved claim was denied or the benefits awarded to the claimant were reduced. Finally, as of February 6, 2006, the monitor was still reviewing petitions to reexamine initial claims decisions and the adjudicator and arbitrator were continuing to reexamine claims decisions as directed by the monitor.

Background

The *Pigford* case was initiated in 1997, when African-American farmers filed a class action lawsuit against the USDA alleging that it willfully discriminated against them and other African-American farmers by denying their applications for farm loans and benefit programs, or delaying the processing of their applications, and failing to properly investigate and resolve their complaints of discrimination. This lawsuit was certified by the United States District Court for the District of Columbia as a class action suit on October 9, 1998. On January 5, 1999, District Court Judge Paul L. Friedman preliminarily approved a consent decree proposed by the federal government and class counsel to settle this lawsuit. After a fairness hearing was held on March 2, 1999, to address potential issues with the proposed consent decree, the parties made some revisions and filed a modified proposed consent decree. On April 14, 1999, District Court Judge Paul L. Friedman approved the modified consent decree as a fair, adequate, and reasonable settlement.

The consent decree defined the roles and responsibilities of the following officials who were appointed by the court to implement the settlement:

- The Facilitator (Poorman-Douglas Corporation) The facilitator was responsible for notifying known and potential members of the class that a settlement had been reached by conducting an advertising campaign composed of television commercials and print advertisements early in 1999. The facilitator was also responsible for receiving potential class members' claims, screening claims to determine whether they met the class definition, and assigning claims to the adjudicator and arbitrator for action.

- The Adjudicator (JAMS-Endispute Inc.) The adjudicator is responsible for deciding whether farmers' Track A claims have met the required burden of proof. Over 22,000 claims have been processed under Track A.

- The Arbitrator (Mr. Michael K. Lewis of ADR Associates) The arbitrator is responsible for determining, after holding evidentiary hearings, whether farmers' Track B claims have met the required burden of proof. A total of 166 claims have been processed under Track B. The arbitrator was also assigned responsibility for reviewing petitions from potential class members who filed late claims.

- The Monitor (Ms. Randi Ilyse Roth, formerly of the Farmers Legal Action Group)[8] The monitor began her duties in March 2000, about six months after the October 12, 1999 deadline for potential class members' to submit claims, and was not involved in the advertising campaign to reach out to potential class members. The monitor is responsible for directing the facilitator, adjudicator, or arbitrator to reexamine a claim if she determines that a clear and manifest error occurred in

[8]Under the terms of the consent decree, counsel for both parties to the lawsuit each submitted two names for the court to consider appointing as monitor. On January 4, 2000, the court entered an order appointing Randi Ilyse Roth as monitor.

the screening, adjudication, or arbitration of a claim that has resulted or is likely to result in a fundamental miscarriage of justice. To initiate a reexamination of a claim, class members or the federal government were required to file a petition requesting a reexamination and explaining why they believed the decision of the facilitator, adjudicator, or arbitrator was in error.[9] The monitor reviews such petitions and directs the facilitator, adjudicator, or arbitrator to reexamine a claim if she determines that a clear and manifest error occurred in the screening, adjudication, or arbitration of a claim that resulted or is likely to result in a fundamental miscarriage of justice. In addition, the monitor is responsible for attempting to resolve problems that class members have with the consent decree, staffing a toll-free telephone line, and periodically reporting to the court and the Secretary of Agriculture on the good faith implementation of the decree. As of early 2006, the monitor's office had a staff of 26, including 12 attorneys, to assist in performing her assigned tasks.

The efforts to reach potential class members were started in January 1999. Under the terms of the consent decree, the court-appointed facilitator, Poorman-Douglas Corporation, was assigned the duty of publishing the Notice of Class Settlement as directed in the decree. This included mailing a copy of the Notice of Class Certification and Proposed Class Settlement to all known members of the class within 10 days of the court's preliminary approval of the consent decree. In addition, the consent decree directed the facilitator, as soon as possible after the preliminary approval of the consent decree, to take the following actions to announce the preliminary settlement and the time and place of the fairness hearing: (1) arrange to have 44 commercials aired on the Black Entertainment Television (BET) network and 18 similar commercials on the Cable News Network (CNN) during a two-week period; (2) arrange to have one-quarter page advertisements in 27 general circulation newspapers and 115 African American newspapers in an 18-state region during a two-week period; and (3) arrange to have a full page advertisement in the editions of TV Guide that are distributed in an 18-state region and a half page advertisement in the national edition of Jet Magazine.[10] In his April 1999 order approving and entering the consent decree, Judge Friedman concluded that the potential class members had received more than adequate notice, stating that the parties had exercised extraordinary efforts to reach class members through the massive advertising campaign that had been conducted. Furthermore, he observed that by March 26, 1999, 16,559 farmers had requested claims packages from the facilitator.

The consent decree provided about six months for potential class members to file claims, with a deadline of October 12, 1999. To be eligible to obtain relief pursuant to the consent decree, a claimant was required to complete a claim sheet and return it with any supporting documentation to the facilitator. As part of the claim, the claimant had to

[9]Under certain circumstances, class members and the federal government are allowed to provide additional information to the monitor that was not included with the original claim if their claim was processed under Track A.

[10]In addition, USDA was to use its best efforts to obtain the assistance of community based organizations to communicate to class members and potential class members that the court had preliminarily approved the consent decree and the time and place of the March 1999 fairness hearing.

provide the facilitator with evidence that he or she had filed a discrimination complaint between January 1, 1981, and July 1, 1997. Under the consent decree terms, the claimant could provide this evidence by submitting one of the following:

- a copy of the discrimination complaint filed with USDA or a copy of a USDA document referencing the discrimination complaint;

- a declaration by a person who was not a member of the claimant's family, stating that the declarant had first-hand knowledge that the claimant had filed a discrimination complaint with USDA and describing the manner in which the discrimination complaint was filed;

- a copy of correspondence from the claimant to a member of Congress; the White House; or a state, local or federal official averring that the claimant had been discriminated against (except that, in the event that USDA did not possess a copy of the correspondence, the claimant also was required to submit a declaration stating that he or she sent the correspondence to the person to whom it was addressed);

- a declaration by a non-familial witness stating that the witness had first-hand knowledge that, while attending a USDA listening session or other meeting with a USDA official (or officials), the claimant was explicitly told by a USDA official that the official would investigate that specific claimant's oral complaint of discrimination.[11]

An individual who satisfied the criteria for membership in the class, but who did not file a discrimination complaint until after July 1, 1997, could be entitled to relief under the consent decree by demonstrating that he or she: (1) actively pursued judicial remedies by filing a defective pleading during the applicable statute of limitations period; (2) was induced or tricked by USDA's misconduct into allowing the filing deadline for the applicable statute of limitations period to pass; or (3) was prevented by other extraordinary circumstances beyond his or her control from filing a complaint in a timely manner, though neglect did not qualify as an extraordinary circumstance. In these cases, the facilitator forwarded the claim package to the adjudicator who reviewed the package to determine if the claimant met one of the three standards. Once the adjudicator made a determination, the claim package was returned to the facilitator with a written determination and the facilitator was to process the claim, if found to be timely, or to notify the claimant of the adjudicator's decision that the claim was untimely.

Under the consent decree, claimants who satisfied the definition of the class, including the filing of a discrimination complaint, but who had not submitted a completed claim package by the filing deadline of October 12, 1999 could petition the court to permit them to participate in the settlement. However, the consent decree provided that the

[11]Any declarations were required to be made pursuant to 28 U.S.C. § 1746, which prescribes the form in which such declarations, as true under penalty or perjury, must be provided.

court would grant such a petition only where the claimant demonstrated that his or her failure to submit a timely claim was due to extraordinary circumstances beyond his or her control. The court delegated the authority to the arbitrator to examine these claims on a case-by-case basis. The deadline the court established for filing a petition to file a late claim was initially January 30, 2000, and later the court extended this deadline to September 15, 2000. According to the arbitrator's report of November 2005, about 66,000 petitions to file a late claim were received by September 15, 2000, and an additional 7,800 were received after the late claim deadline. Of these, the arbitrator denied all but 2,229. An example of extraordinary circumstances beyond an individual's control that the arbitrator approved involved farmers who resided or farmed in one of the North Carolina counties declared to be a federally designated disaster area as a result of Hurricane Floyd and who asserted that the disaster prevented them from submitting a claim before the October 12, 1999, deadline. Potential class members' claims that they did not hear of the opportunity to submit a claim until it was too late were not considered by the arbitrator to have represented an extraordinary circumstance. When reviewing late claims, the arbitrator collaborated with the facilitator's staff to develop a series of categories into which late claim affidavits were sorted. Those affidavits in the "Unaware of Lawsuit" category, without any mitigating factors, were rejected.

The terms of the consent decree required the facilitator to determine whether the claimant satisfied the criteria for membership in the class within 20 days of receiving a completed claim. If the claimant was determined to be a class member, the facilitator was to forward the claim package to the adjudicator or the arbitrator and send a copy of the claim package to the class counsel and government counsel.

To address the claims of class members, the consent decree established two tracks—Track A and Track B. These tracks differ in three basic ways: the level of evidence required, the manner in which claims are decided, and the potential amounts of the awards. Class members could generally elect to proceed under either track.[12] Track A claimants' cases are decided by the adjudicator based on the evidence that claimants can provide, and without a hearing. To prove a Track A claim, the claimant's written materials must provide substantial evidence that he or she was the victim of race discrimination by USDA when he or she applied to participate in a farm program.[13] When a Track A credit-related claim is proven the claimant is eligible to receive a cash payment of $50,000, a discharge of certain outstanding debt, and other relief. When a Track A claim of discrimination in a non-credit benefits program is proven the claimant is eligible for a single payment from USDA of $3,000.

In contrast, Track B claimants are required to meet a higher standard of proof by demonstrating in an evidentiary hearing by a "preponderance of the evidence" that they

[12]Class members whose claims arose exclusively under non-credit benefit programs, however, had to file under Track A.

[13]Substantial evidence is defined as relevant evidence appearing in the record that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence that fairly detracts from that conclusion.

were the victims of racial discrimination and suffered damages as a result of that discrimination. A preponderance of the evidence is defined as such relevant evidence as is necessary to prove that something is more likely true than not true. Also, at the hearing, the government may cross examine opposing witnesses and present legal arguments. When a Track B claim is proven, the claimant is provided an amount equal to his or her actual damages, receives a discharge of outstanding debt to the USDA's Farm Service Agency, and other relief. Track B awards have ranged from $52,000 to approximately $1,500,000.

In cases where the class member or the federal government disagreed with the adjudication or arbitration of a claim, either party could file a petition with the monitor to request that these decisions be reexamined.[14] The consent decree provides that the monitor is to direct a reexamination when she determines that a clear and manifest error has occurred in the screening, adjudication, or arbitration of the claim and that this error has resulted or is likely to result in a fundamental miscarriage of justice. The monitor does not have the power to reverse any of the facilitator's, adjudicator's, or arbitrator's decisions. The monitor reviews the petition for reexamination, any response to that petition, the record before the facilitator, adjudicator, or arbitrator, and the decision that is the subject of the petition. For Track A claims only, under certain circumstances, the class member or the government may include with the petition for monitor review any documents that help them explain or establish that an error occurred. However, the monitor is not permitted to consider additional materials when reviewing Track B petitions or to supplement the record with such materials.

The Monitor's Participation in Outreach Activities

The monitor and her staff have participated in outreach activities, although the consent decree did not specifically assign outreach duties to the monitor. Outreach responsibilities under the consent decree—the initial notification of the known and potential class members--were assigned to the facilitator. Between February 2000 and December 2005, the monitor and lawyers from the monitor's office participated in 60 public meetings at the request of agriculture associations, universities, state and federal government agencies, and other interested sponsoring organizations. The monitor and her staff served as speakers at these meetings, where they explained the role of the monitor as directed by the consent decree and met with individuals to discuss their specific concerns. Approximately 9,400 individuals, including claimants and government officials, attended these meetings that were held in 12 states and the District of Columbia.[15] Table 1 shows that the numbers of meetings and attendance varied by state. The monitor told us that some of these meetings were the sponsoring organization's annual meetings with attendees from a number of states.

[14]In addition, claimants could petition the monitor to request the reexamination of some of the facilitator's screening decisions.

[15]According to the 2002 Agriculture Census, about 87 percent of the African-American farm operators live in these states.

Table 1: Meetings Attended by the Monitor and/or Her Staff, February 2000 through December 2005.

State	Number of meetings	Sponsoring organizations	Approximate number of attendees
Alabama	12	• Federation of Southern Cooperatives/Land Assistance Fund • Professional Agricultural Workers Conference • Tuskegee University • United Farmers USA	**2,090**
Arkansas	13	• Arkansas Chapter of the Black Farmers and Agriculturalists Association, Inc. • Arkansas Land and Farm Development Corporation • Arkansas Pine Bluff University • Black Farmers and Agriculturalists Association, Inc.	**1,700**
Georgia	11	• African American Family Farmers, Inc. • Coordinating Council of Black Farm Groups • Federation of Southern Cooperatives/Land Assistance Fund • Fort Valley State University • USDA Outreach	**1,355**
Louisiana	2	• Northeast Louisiana Farmers • Southern University and A&M College Family Farm Technical Assistance Project	**190**
Maryland	1	• USDA	**50**
Mississippi	3	• Alcorn State University • Mississippi Family Farmers	**200**
North Carolina	1	• Congressman Mike McIntyre	**250**
Oklahoma	7	• FSA State Directors • Oklahoma Chapter of the Black Farmers and Agriculturalists Association, Inc. • Oklahoma Department of Agriculture • USDA Oklahoma Department of Food and Forestry	**2,400-2,500**
South Carolina	1	• United Farmers of South Carolina	**205**
Tennessee	3	• Tennessee Chapter of the Black Farmers and Agriculturalists Association, Inc. • USDA Risk Management	**290**
Texas	1	• Landowners' Association of Texas	**60**
Washington, D.C.	3	• Federation of Southern Cooperatives/Land Assistance Fund • Congressional Black Caucus	**175**
Virginia	2	• National Black Farmers Association	**400**

Source: Randi Roth, Court-appointed Monitor, *Pigford v. Glickman.*

Note: Ms. Roth stated that she attended the meetings held over the first year and some others, and also, that Mr. Stephen Carpenter, Senior Counsel for the monitor's office, attended almost all of the meetings.

These meetings provided opportunities for the monitor and her staff to hear and respond to the concerns of individuals. For example, claimants with approved claims expressed concerns about the timing of payments, the amount of debt relief and injunctive relief they would receive, and other issues, such as taxes. Claimants whose claims were denied sought information about filing a petition with the monitor to have their claim reexamined and the timing of reexamination decisions, among other issues. In the monitor's reports and our interviews with her, she reported that in many cases several of

her staff attended these meetings, which made it possible for one or two attorneys from the monitor's office to address the large group while the other attorneys worked with individuals to address their concerns. The monitor has addressed these topics and others by publishing 15 *Monitor Updates*, which the monitor's staff distributed before and after the public meetings, and also during one-on-one sessions with individuals who expressed concerns about specific topics. The *Monitor Updates* are also available on the monitor's official Website.

In addition, the court required the monitor to be available to class members and the public through a toll-free telephone number in order to facilitate the lodging of any consent decree complaints and to expedite their resolution. The monitor established a toll-free number that has been available to the public since May 29, 2000. The monitor said her office has received over 131,000 calls on this toll-free number. Callers who use the toll-free number reach phone operators who have been trained regarding the basics of the consent decree and who have access to a database containing certain factual information about each claimant, such as the claimant's name, the names of any other individual who is authorized to request information on behalf of a claimant, filing dates for claims and petitions filed by the claimant, and the status of any payments to the claimant. As a result, the operators are able to respond to some questions during a call. For example, the operators can respond to questions as to when a payment was approved or sent to the individual, as well as questions about filing deadlines associated with the case. These operators also have access to documents that can be sent to individuals upon request, including court orders, farm loan program notices, monitor reports, and monitor updates. For questions about debt relief, injunctive relief, and other complex issues, the operators make appointments for the caller to speak with a lawyer from the monitor's office.

The consent decree requires the monitor to periodically report to the court, class counsel, defendant's counsel and the Secretary of USDA on the good-faith implementation of the consent decree. The monitor has completed four implementation reports which, along with other monitor reports on particular topics, are available on the monitor's Web site. The reports provide details about the activities of her office, statistical information on the status of claims processing, and her observations about the implementation of the *Pigford* case. For example, in 2004 and 2005, the monitor's reports on the consent decree implementation noted that claimants had expressed concerns that many people who met the class definition had failed to sign up for the lawsuit on time because the advertising campaign did not reach them.[16] Because a vast majority of farmers attempted to file claims after the settlement deadline, some groups, such as the National Black Farmer's Association, have argued that the notice of the settlement was insufficient to reach the majority of potential class members. Others have suggested additional explanations. In particular, one of the attorneys for the plaintiffs explained that many African-American farmers did not apply by the October

[16]See Randi IIyse Roth, *Monitor's Report and Recommendations Regarding Implementation of the Consent Decree for the Period of January 1, 2002, through December 31, 2003*, (St. Paul Minnesota: Aug. 19, 2004); and *Monitor's Report Regarding Implementation of the Consent Decree for the Period of January 1, 2004, through December 31, 2004*, (St. Paul Minnesota: Dec. 16, 2005).

filing deadline either because they initially had no faith that the government would ever make such payments, or because they did not realize that the children of farmers could make claims on behalf of their parents.[17] The arbitrator contacted a quarter of those who applied late and found several explanations--that they had been unaware of the settlement, the deadlines and procedures for the consent decree, or were aware but disbelieved in its legitimacy or their eligibility under the consent decree. On January 3, 2005, Judge Paul L. Friedman of the United States District Court for the District of Columbia issued an opinion expressing concern for African-American farmers, who, because they had not filed on time, were barred from participating in the consent decree claims-resolution process. Nevertheless, the court found that the notice of the settlement and claims process was more than adequate and met the standards for class action settlements.

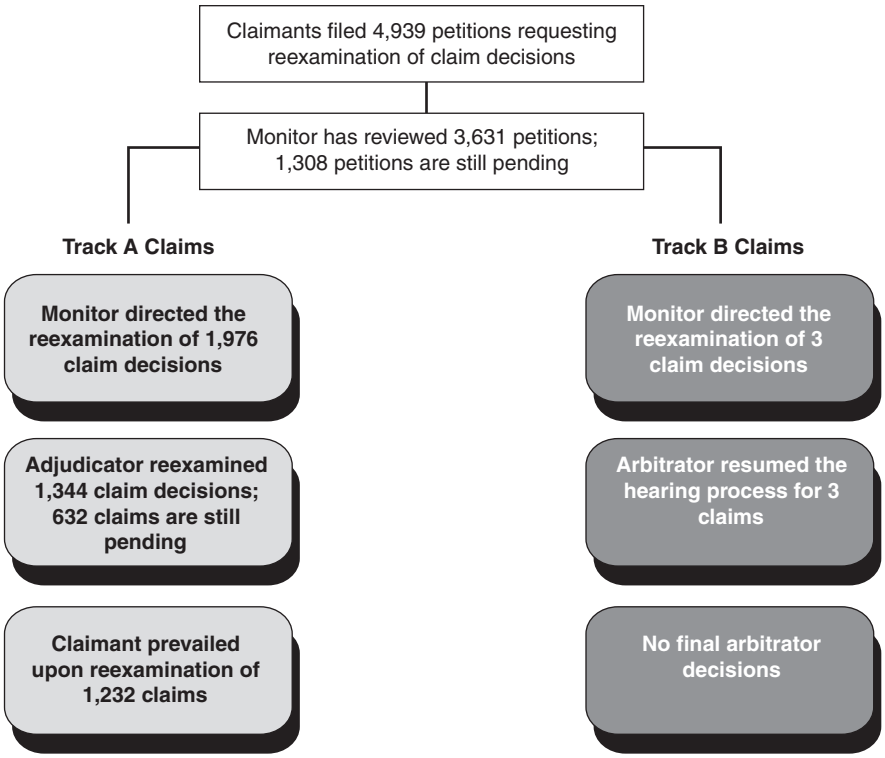
The Monitor Directed the Reexamination of 2,059 Claims and Most Reexaminations Reversed or Altered the Initial Decision

The monitor's office has played an active role in implementing the consent decree by reviewing about one quarter of the claims decisions that have been made in the *Pigford* case. Overall, as of February 6, 2006, the monitor's office has received 5,669 petitions requesting the reexamination of an initial claim decision—4,939 from African-American farmers and 730 from the federal government. Most petitions from African-American farmers concerned claims that they believed were denied inappropriately, but 162 farmers filed petitions for review claiming they were due additional benefits. Of the 4,939 claims that African-American farmers petitioned to be reexamined, the monitor had completed reviewing 3,631 of them and directed that 1,979 claims be reexamined as of February 6, 2006.[18] The following figure indicates that, of the claims that had been reexamined, the adjudicator found in favor of African-American farmers and awarded payments in over 90 percent of the cases. As a result, previously denied claims were approved or the benefits awarded to the farmer were increased.

[17]Speech of Mr. J.L. Chestnut of Chestnut, Sanders, Sanders, Pettaway, & Campbell, L.L.C. at the Federation of Southern Cooperatives/Land Assistance Fund's 2005 22nd Annual Farmer's Conference in Albany, Georgia, February 19, 2005.

[18]As of February 6, 2006, the monitor had reviewed 4,236 petitions for reexamination (3,631 from African-American farmers and 605 from the government). Of these, the monitor directed the further reexamination of 2,057 (1,979 from African-American farmers and 80 from the government).

Figure 1: Status of African-American Farmers Petitions for Reexamination of Claims Decisions as of February 6, 2006.[19]



Source: provided by Randi Roth, Court-Appointed Monitor, *Pigford v. Glickman*.

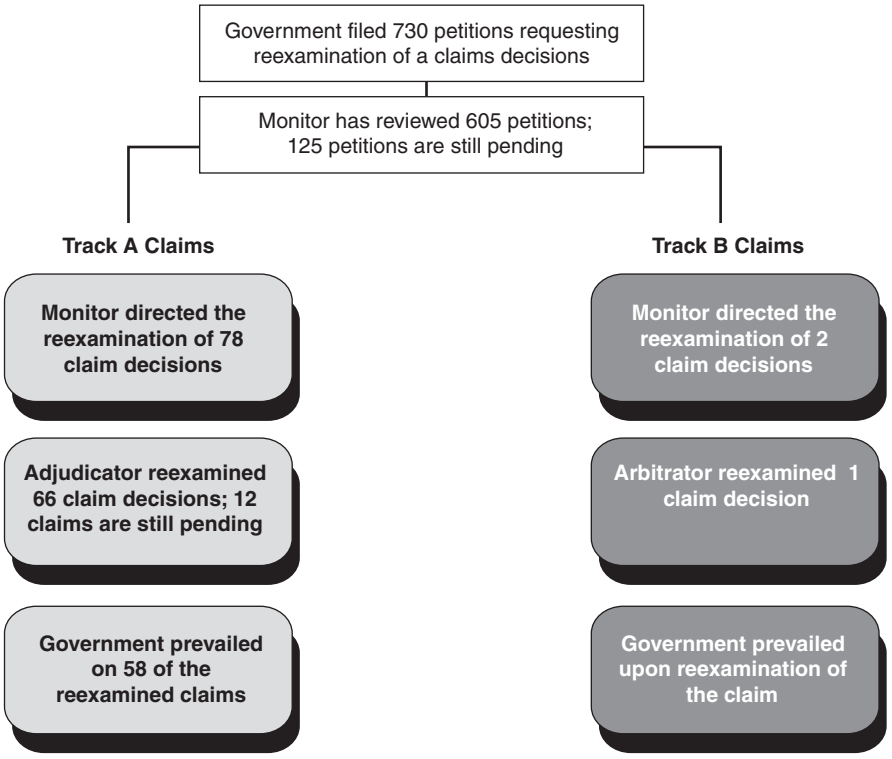
According to the monitor, some of the flaws that were noted in petitions from claimants included (1) the limited time these individuals had to present claim information during meetings where class counsel provided assistance in completing claim packages, and (2) difficulties providing information about similarly situated white farmers as required under Track A. In many of these cases, the class member's petition for review provided the monitor with more complete information that had not been presented when the claim was initially denied, including information about their treatment by USDA staff, information about similarly situated white farmers, or additional information that responded to specific statements in the adjudicator's initial decision. The monitor observed that in most cases where she directed a reexamination, the farmer had provided her office with additional information supporting the farmers' claim of discrimination.

In addition, the government petitioned the monitor for a reexamination of 730 claim decisions that were found in favor of a claimant and awarded them benefits. When the government filed petitions with the monitor to have claims decisions reexamined, the

[19]Ninety-four petitions were from potential class members who had been rejected by the facilitator in the initial screening process. The monitor has reviewed all of these petitions and directed the facilitator to reexamine 22 of them. As of February 6, 2006, the facilitator had reexamined all 22 cases and has found all 22 of the claimants to be eligible to participate in the claims process.

types of flaws or mistakes that they noted included flaws in information provided by claimants, such as when and to whom in USDA the claimant had complained to about discriminatory treatment or constraints on the time the government was allowed when responding to the claims initially. For example, some of the historical records for these USDA programs were stored on microfiche records that are maintained in St. Louis and not readily available. As of February 6, 2006, the monitor had reviewed 605 of these petitions, as shown in figure 2. Of the 605 petitions, the monitor has denied the government request for a reexamination in about 87 percent of these cases. However, in the 80 cases where the monitor directed the reexamination of an initial claim at the request of the government, the government prevailed in 59 of those cases. As a result, previously approved claims were denied or the benefits awarded to a claimant were modified.

Figure2: Status of Federal Government Petitions for Review of Claims Decisions as of February 6, 2006.



Source: provided by Randi Roth, Court-Appointed Monitor, *Pigford v. Glickman*.

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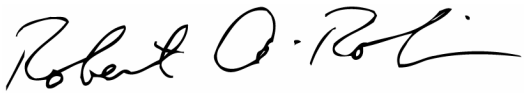
As agreed with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. We will then send copies of this report to the President, the Attorney General, the Secretary of Agriculture, appropriate congressional committees, and other interested parties. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have any questions about this report or need additional information, please contact me at (202) 512-3841 or robinsonr@gao.gov. Contact points for our Offices of Congressional Relations or Public Affairs may be found on the last page of this report. Key contributors to this report were Charles M. Adams, Assistant Director; John Delicath; Natalie Herzog; Lynn Musser; and Amy Webbink.



Robert A. Robinson
Managing Director, Natural Resources
and Environment

List of Congressional Requesters

The Honorable Edolphus "Ed" Towns
Member of Congress

The Honorable Bennie Thompson
Member of Congress

The Honorable John Conyers
Member of Congress

The Honorable Robert C. Scott
Member of Congress

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
House of Representatives

The Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
House of Representatives

Scope and Methodology

To determine what outreach or outreach oversight the monitor provided in the *Pigford* case, we reviewed the consent decree that described the monitor's role in implementing the settlement and the standards that she was to follow in carrying out her responsibilities; the January 4, 2000, court order appointing the monitor; and the April 4, 2000, order of reference that further described the monitor's responsibilities and powers. We also interviewed the monitor and staff from her office about the outreach and outreach oversight activities that she performed, and the information that she and her staff provided during these activities. In addition, we reviewed the monitor's four reports on the good-faith implementation of the consent decree and her congressional testimony at a hearing on the status of the implementation of the *Pigford* consent decree. In addition, we reviewed the congressional testimony of the facilitator and arbitrator about the notice to the class and requests to file late claims. Further, we reviewed the 15 published monitor updates on topics, such as filing deadlines and parties to the *Pigford* consent decree, which the monitor and her staff shared with the public as part of her outreach activities.

To identify the number of cases where the court-appointed monitor's work in the *Pigford* case resulted in reexaminations of claims, and to identify the results of the reexaminations, we reviewed the consent decree, court orders, and the monitor's reports to determine the process established for requesting a reexamination of a claim decision and the standards the monitor was to use when reviewing and approving these requests. We also reviewed the statistics included in the monitor's September 2004 congressional testimony and her reports for 2000 through 2004 to identify the number of petitions that were filed with the monitor's office requesting a reexamination of a claims decision, the number of petitions for reexaminations of a claims decision that were approved, and the results of any reexaminations. We did not review specific cases nor assess case decisions made under the settlement agreement. We further reviewed the data provided by the monitor's office for the period ending February 6, 2006. We did not assess the data published in the monitor's testimony and reports or the data the monitor provided to us. Because of the public nature of these data, we deemed them reliable for the purposes of this report.

To describe the role of an agency ombudsman in resolving disputes, we reviewed the ombudsman standards developed by the American Bar Association (ABA); the Coalition of Federal Ombudsman; the United States Ombudsman Association; and the University and College Ombudsman Association. We also reviewed a draft copy of the guide for federal employee ombudsmen developed by the Coalition of Federal Ombudsman in conjunction with the Federal Interagency Alternative Dispute Resolution Working Group Steering Committee. In addition, we reviewed our previous reports on the role of ombudsmen in dispute resolution, and on the Environmental Protection Agency's ombudsman. Further, we interviewed the Department of Labor's Office of Inspector General Ombudsman, who is currently the Chair of the Coalition of Federal Ombudsman; the Transportation Security Administration's Ombudsman, who is currently the Vice-Chair of the Coalition of Federal Ombudsman; the City of Dayton and Montgomery County, Ohio Ombudsman, who is currently a Director of the United States Ombudsman

Association, and the Stony Brook University Ombudsman, who is currently the President of the International Ombudsman Association, to discuss the role of an ombudsman in dispute resolution and the potential of ombudsmen to address civil rights.[20] We did not identify any comprehensive reports on evaluations of the federal ombudsmen who address issues raised by the public.

To identify cases where the work of other monitors was found to be ineffective or problematic, and what court or legislative remedies were provided, we searched a number of legal databases for relevant examples. To find examples where Congress had found the work of a monitor to be ineffective or problematic, and any corresponding legislative remedies, we conducted a variety of searches in legislative, legislative history, and legal journal databases. Because courts have appointed monitors as "special masters" under Rule 53 of the Federal Rules of Civil Procedure, to find examples where the courts had found the work of a monitor to be ineffective or problematic, and corresponding remedies, we reviewed over 1,600 federal cases citing Rule 53. We also reviewed over 600 federal cases in which the terms "court," "monitor," and some form of the word "appoint" occur in the same sentence.

We conducted our work between August 2005 and March 2006 in accordance with generally accepted government auditing standards.

[20]The Ombudsman Association and the University and College Ombuds Association recently merged to form the International Ombudsman Association.

Role of an Agency Ombudsman in Resolving Disputes

Based on congressional interest, we developed information on ombudsmen that might be useful in considering the potential use of an ombudsman at USDA to address civil rights issues. USDA does not now have such an ombudsman. Our past work on the use of ombudsman offices,[21] American Bar Association (ABA) guidance on and information about ombudsmen, and our interviews with those familiar with the use of ombudsmen in the United States shows that ombudsmen (1) are increasingly being used by federal, state and local governments and (2) address a wide variety of workplace problems, including program access and civil rights issues. Moreover, the international use of ombudsmen is flourishing, with ombudsmen being used at national levels of government in about 120 countries as of 2004, according to the International Ombudsman Institute. In several countries, the protection of human rights is one of the major purposes of ombudsman offices, indicating the potentially significant depth of the ombudsman role.

An ombudsman, as a protector of individual rights, is a dispute-resolution practitioner. An ombudsman is a neutral party who uses a variety of procedures, including alternative dispute resolution techniques, to deal with complaints, concerns, and questions. An ombudsman (1) receives complaints, concerns, and questions from individuals; (2) works to resolve these issues; and (3) makes recommendations for improving the general administration of the department, agency, or entity for which they have responsibility. Ombudsmen can address a very wide range of issues, for example, from the concerns of individuals about access to programs, to systemic management problems, to policy shortcomings. Ombudsmen can thereby help correct organization-wide problems and also help develop strategies for preventing and managing conflict. A key feature that distinguishes ombudsmen from other dispute-resolution practitioners is the ombudsman's focus on addressing systemic issues and developing conflict-prevention strategies.

Growth in the Use of Ombudsmen

Over the past three decades, there has been an extraordinary growth in the number and types of ombudsmen. Ombudsman offices have been established in federal, state, and local governments, academic institutions, and the private sector. The Chair of the Coalition of Federal Ombudsmen told us that the Coalition includes ombudsmen members that represent 37 federal agencies. Moreover, the Administrative Dispute Resolution Act (ADRA) authorizes federal agencies to use ombudsmen, and Congress has established several ombudsman positions in various programs. For example, the U.S. Environmental Protection Agency has ombudsmen who serve as points of contact for members of the public who have concerns about Superfund activities.[22] Also, the ombudsman for the National Institutes of Health (NIH) addresses issues for employees

[21]GAO, *Human Capital: The Role of Ombudsmen in Dispute Resolution*, GAO-01-466 (Washington, D.C.: April 13, 2001).

[22]The Superfund Program provides support to locate, investigate, and clean up hazardous waste sites nationwide.

of the NIH, such as staff and management interaction, performance appraisals, difficult management situations, discrimination, harassment, interpersonal misunderstandings, mentoring, authorship, and scientific collaboration. In addition, the ombudsman for the Federal Deposit Insurance Corporation (FDIC) handles inquiries from FDIC-regulated banks, the public and FDIC employees. The FDIC ombudsman can answer questions about corporation policies and procedures and concerns regarding open or closed bank matters, and assist with complaints regarding FDIC operations, employees, and contractors.

Ombudsmen are also in widespread use internationally—including Canada, Europe, Latin American, the Caribbean, Africa, Australia and Asia. As of 2004, ombudsmen are being used at national levels of government in about 120 countries, according to the International Ombudsman Institute. In a number of countries the protection of human rights is one of the major purposes of some ombudsmen offices. According to the International Ombudsman Institute, examples include the Ombudsman of Finland, Civil Rights Protector of Poland, the Human Rights Ombudsman of Slovenia, the Parliamentary Commissioner for Human Rights in Hungary, and the Defensores del Pueblo in Spain, Argentina and Peru. Also, in the European Union, all citizens have the right to refer their problems involving the activities of European community institutions to the Ombudsman of the Union. In 2000, the Union's ombudsman reported that about 8 percent of the complaints he addressed involved matters of discrimination. For example, as a result of inquiries by the European Union Ombudsman, the European Commission abolished a rule allowing sex discrimination which had worked to the disadvantage of women. In addition, ombudsmen in Britain and Ireland address a wide variety of issues including, for example, housing, health, pensions, police investigations, insurance, telecommunications, estates, and legal services.

Standards for Ombudsmen

The ABA developed standards for the use of ombudsmen to provide advice and guidance on the structure and operation of ombudsman offices. The standards call for ombudsman to operate consistently with the following essential characteristics—independence, impartiality, and confidentiality.

Independence—The ombudsman is, and appears to be, free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity, or by a person who may be the subject of a complaint or inquiry.

Impartiality in conducting inquiries and investigations—The ombudsman conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombudsman from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombudsman may become an advocate for change within the entity when the evidence demonstrates a need for it.

Confidentiality—An ombudsman does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombudsman's office. An ombudsman does not reveal the identity of a complainant without that person's express consent.

The ABA standards also state that an ombudsman may make formal or informal reports of results and recommendations stemming from a review of investigation. If such a report is issued, the ombudsman should generally consult with an individual or group prior to issuing a report critical of that individual or group, and include their comments with the report. In addition, the ABA standards state that to ensure the office's accountability, an ombudsman should issue and publish periodic reports summarizing the ombudsman's findings and activities. These reports may include statistical information about the number of contacts with the ombudsman and the subjects that the ombudsman addressed. The chair of the Coalition of Federal Ombudsmen told us that he is part of a working group looking at developing standard data categories for annual reports to be prepared by ombudsmen so that the work of ombudsmen in the federal government can be compared and summarized. We did not identify any comprehensive evaluations of the federal ombudsmen who address concerns from the public.

According to the ABA standards, there are four types of ombudsmen based on how the office was established and their functions.

Legislative ombudsmen—A legislative ombudsman is established by the legislature as part of the legislative branch and addresses issues raised by the general public or internally, usually concerning the actions or policies of a government agency, official, public employee, or contractor.

Executive ombudsmen—An executive ombudsman may be located in either the public or private sector and receives complaints from the general public or internally, and addresses actions or failures to act by the entity, its officials, employees, or contractors.

Organizational ombudsmen—An organizational ombudsman may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies.

Advocate ombudsmen — An advocate ombudsman may be located in either the public or private sector and, like other ombudsmen, evaluates claims objectively, but is either authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

While an ombudsman may expedite and facilitate the resolution of a complaint and recommend changes to agency procedures, an ombudsman as envisioned by the ABA standards should supplement and not substitute for an entity's formal procedures that

may be necessary to protect legal rights and to address allegedly inappropriate or wrongful behavior or conduct. Nevertheless, if an ombudsman finds a shortcoming in agency policies, procedures and processes, he or she is expected to raise those issues for resolution or reconsideration.

Potential for an Ombudsman to Address Civil Rights Issues at USDA

Several core aspects of the functioning and purpose of an ombudsman make such an office an option for consideration at USDA. An ombudsman not only works to resolve disputes but also is in a position to alert management to systemic problems and thereby help correct organization-wide situations and develop strategies for preventing and managing conflicts. Moreover, an ombudsman office can help an organization assure a fair, equitable and nondiscriminatory environment. In this regard, the voice of an independent ombudsman could potentially be useful in addressing concerns about equitable access to programs and other civil rights issues at USDA. Before deciding whether an ombudsman office at USDA should be instituted, a variety of factors would need to be carefully considered, including the relationship of the ombudsman to USDA's existing organizations, the specific roles and responsibilities to be assigned to the ombudsman, the authorities that would be provided to ensure a successfully functioning ombudsman, the degree of independence to be afforded the ombudsman, and the staffing and budgeting of an ombudsman's office.

Remedies in Cases of Ineffective or Problematic Monitors

Based upon congressional interest we conducted a search for cases where the work of a court-appointed monitor was found by a court or the Congress to be ineffective or problematic, and summarized any remedies that were provided in such cases. To identify such cases, we searched a number of legal databases for relevant examples. To find examples where Congress had found the work of a monitor to be ineffective or problematic, and any corresponding legislative remedies, we conducted a variety of searches in legislative, legislative history, and legal journal databases. Because courts have appointed monitors as "special masters" under Rule 53 of the Federal Rules of Civil Procedure, to find examples where the courts had found the work of a monitor to be ineffective or problematic, and corresponding remedies, we reviewed over 1,600 federal cases citing Rule 53. We also reviewed over 600 federal cases in which the terms "court," "monitor," and some form of the word "appoint" occur in the same sentence.

Based upon our review, we determined that it has been rare for a court or the Congress to take action because a monitor's work was found to be ineffective or problematic. We found just a handful of cases where a court found that a monitor's work was in some way problematic or ineffective. Additionally, we found only one instance where Congress took action with regard to a court-appointed monitor.

In the few instances that we identified where courts found a monitor's work to be ineffective or problematic, monitors mishandled funds and overcharged for their services or the monitors' appointments or delegated functions were invalid. More specifically:

- One court questioned whether a monitor could accomplish his assigned task of transforming an insolvent company's contaminated steel plant site into a means of funding the medical plan of former steelworkers. The court found that the monitor had (1) rejected valid settlement offers to hold out for more compensation for himself, (2) misappropriated funds by forming a $1 million litigation "war chest", (3) paid for personal tax advice with litigant funds, and (4) overbilled for a legal assistant. The court terminated the monitor's appointment and ordered the monitor to personally cover $48,035 for personal tax services and $65,034 for overbilling the services of the legal assistant.[23]

- In litigation over the Department of the Interior's handling of monies held in trust for individual Indians, the Court of Appeals ordered the removal of a monitor who had been appointed by the district court to monitor and review all of the Interior defendants' trust reform activities. The Court of Appeals concluded that the appointment of the monitor was made over the objection of the defendants and therefore was not valid.[24]

[23]*Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989 (9th Cir. 2003).

[24]*Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

- In another appellate court case, the court held that a district court's order appointing a monitor effectively usurped executive functions. A class action lawsuit was brought on behalf of female inmates of the District of Columbia, where the district court entered an order directing one or more members of the court's Special Officer's staff to monitor allegations of sexual harassment at each facility housing women prisoners. The monitor was to ensure that each reported violation be thoroughly investigated and documented. The monitor was to submit a final written report to the warden of the institution, including factual findings and a conclusion as to whether a preponderance of the evidence showed that a violation of the sexual harassment policy occurred. The appellate court, however, held that these provisions effectively usurped the executive functions of the District of Columbia. The court noted that while the appointment of a special master to oversee compliance with a court order may be useful in unusual circumstances, the master's role in such cases has been limited.[25]

In the one case we found where the Congress acted because of concerns that a monitor's work was problematic, Congress expressed concern that a monitor's pay was excessive and took action to limit that pay. After becoming concerned that a monitor appointed in Indian trust litigation was receiving excessive compensation, Congress included a provision in the Interior's appropriations legislation for fiscal years 2004 and 2005 that prohibited the use of funds to compensate the monitor at an annual rate of more than 200 percent of the highest Senior Executive Service rate of pay for the Washington-Baltimore locality pay area.[26]

Overall, we found that is was rare for a court or the Congress to take action because a monitor's work was found to be ineffective or problematic, and in those few cases where a court or the Congress sought to provide a remedy, the concerns with the monitors' work were generally similar and included cases where monitors had mishandled funds, overcharged for their services, were receiving excessive pay or where the monitors' appointments or delegated functions were invalid. No concerns have been raised by Congress or the courts about the *Pigford* Monitor's pay, accomplishment of assigned functions, or the validity of the court's delegation of functions to the monitor.

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[25]*Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

[26]*See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 124, 118 Stat. 2809 (2004); Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108, § 127, 117 Stat. 1241 (2003). The court held that this appropriations prohibition made no mention of the Department of Treasury, which was also to bear the costs of the monitor, and denied reconsideration of its order requiring the defendants' to bear the costs incurred. In its concluding remarks, the court noted that it "knows of no previous Congress that has ever intervened in a specific pending civil action to reduce the compensation rate for judicial officials below the market rate set by the Court. For the legislative branch to interfere with an ongoing case by attempting to preclude a court from ordering compensation rates for its special masters appears to be wholly without precedent." *Cobell v. Norton*, 263 F. Supp. 2d 58 (D.D.C. 2003).

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